

United States District Court  
Eastern District of California

Robert Elmer Barber,  
Petitioner,

No. Civ. S 04-1844 MCE PAN P

vs.

McGregor W. Scott, et al.,  
Respondents.

-oOo-

Petitioner requests appointment of counsel on the grounds he is indigent and lacks legal training and the law is complex.

There is no absolute right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, whenever the court determines the interests of justice so require, representation may be provided for any financially eligible person who is seeking relief under section 18 U.S.C. § 2254. 18 U.S.C. § 3006A(a)(2)(B). Unless an evidentiary hearing is necessary, the decision to appoint counsel

1 is discretionary. Bashor v. Risley, 730 F.2d 1228, 1234 (9th  
2 Cir.), *cert. denied*, 469 U.S. 838 (1984); Rule 8(c), Rules  
3 Governing § 2254 Cases.

4 In deciding whether to appoint counsel the court exercises  
5 discretion governed by a number of factors, including the  
6 likelihood of success on the merits and the applicant's ability  
7 to present his claims in light of their complexity. Weygandt v.  
8 Look, 718 F.2d 952, 954 (9th Cir. 1983); see also, LaMere v.  
9 Risley, 827 F.2d 622, 626 (9th Cir. 1987). Ordinarily the  
10 presumption of regularity in the state's procedures for confining  
11 prisoners suggests a lack of likely success and counsels against  
12 appointment of counsel. See Maclin v. Freake, 650 F.2d 885, 887  
13 (7th Cir. 1981). As a general rule, the court will not appoint  
14 counsel unless the applicant shows his claim has merit in fact  
15 and law. Id. Even if the applicant overcomes this hurdle, the  
16 court will not appoint counsel if the law is settled and the  
17 material facts are within the petitioner's possession, viz., they  
18 do not require investigation outside the prison walls. Id. at  
19 887-88.

20 Here, petitioner alleges he was prosecuted in violation of  
21 the double jeopardy clause and the ex post facto clause, the jury  
22 improperly was instructed and the evidence was insufficient to  
23 support his conviction. The law governing this issue is settled.  
24 Neither factual development nor legal insight are required  
25 because these proceedings are limited to claims that already were  
26 identified and presented to the California Supreme Court. There

1 is, on the record before the court, no reason to believe  
2 appointment of counsel would be of significant benefit.

3 Petitioner's August 18, 2005, request for the appointment of  
4 counsel therefore is denied.

5 So ordered.

6 Dated: October 4, 2005.

7 /s/ Peter A. Nowinski  
8 PETER A. NOWINSKI  
9 Magistrate Judge  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26